



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE

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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
Kinder Morgan Operating L.P. "C"
FOR
Elizabeth River Terminals, LLC
VPDES Permit No. VA0081418**

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Kinder Morgan Operating L.P. "C", regarding the Elizabeth River Terminals, LLC facility, for the purpose of resolving certain violations of the State Water Control Law and the applicable permit, and regulation.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "Discharge" means discharge of a pollutant. 9 VAC 25-31-10
6. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
 - (a) Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
 - (b) Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
7. "DMR" means Discharge Monitoring Report.
8. "Effluent" means process wastewater and may include stormwater runoff associated with industrial activities that flows out of an industrial outfall.
9. "Facility" means Elizabeth River Terminals, LLC located at 4100 Buell Street in Chesapeake, Virginia, which discharges process wastewater and stormwater associated with industrial activity from Outfall 001.
10. "Kinder Morgan" means Kinder Morgan Operating L.P. "C", which owns and operates Elizabeth River Terminals, LLC, a limited partnership, and its affiliates, partners, and subsidiaries. Kinder Morgan is a "person" within the meaning of Va. Code § 62.1-44.3.
11. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
12. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
13. "PCB" means polychlorinated biphenyl, which is a toxic pollutant that accumulates in fish tissue.
14. "Permit" means VPDES Permit No. VA0081418, which was issued under the State Water Control Law and the Regulation to Kinder Morgan on January 1, 2015 and which expires on December 31, 2019. The Permit authorizes Kinder Morgan to monitor and discharge stormwater runoff and process wastewaters associated with industrial activities, and commingled stormwater from offsite industrial and MS4 sources, from Outfall 001.

15. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.
16. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.
17. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
18. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
19. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
20. "SWPPP" means Stormwater Pollution Prevention Plan.
21. "TMDL" means total maximum daily load.
22. "TRO" means the DEQ Tidewater Regional Office located in Virginia Beach, Virginia.
23. "Va. Code" means the Code of Virginia (1950), as amended.
24. "VAC" means the Virginia Administrative Code.
25. "VPDES" means Virginia Pollutant Discharge Elimination System.

SECTION C: Findings of Fact and Conclusions of Law

1. Kinder Morgan owns and operates the Facility. At the Facility, Kinder Morgan stores, handles, and ships fertilizer and other products by truck and vessel. Products include ulexite, Etibor, borax, boric acid, salt and pumice. The majority of materials are stored inside warehouses, with the exception of pumice and salt. Salt is stored outside in four separate piles – one pile on the east side of the Facility (east of the pond, west of warehouse 4), one on the west (west of warehouse 7), and two piles in the middle (west of the pond, east of warehouse 1).
2. The Permit allows Kinder Morgan to discharge stormwater runoff and process wastewaters associated with industrial activities, and commingled stormwater from offsite industrial and MS4 sources, from the Facility, to the Southern Branch of the Elizabeth River, in strict compliance with the terms and conditions of the Permit.
3. The Southern Branch of the Elizabeth River is located in the Lower James River Basin watershed. The Southern Branch of the Elizabeth River is listed in DEQ's 305(b) report as impaired for dioxin, dissolved oxygen, and PCB in fish tissue. Among the causes of impairment are industrial point source discharges.
4. Part I.C.3 of the Permit states that the maximum quantification level for monitoring copper and lead is 10 UG/L and 50 UG/L, respectively.
5. Part I.C.4 of the Permit requires that Kinder Morgan report copper and lead as "<QL" if it is less than the quantitative level listed in the Permit. If the quantitative level is not listed in the Permit, then Kinder Morgan shall report the numerical value listed as the detection limit reported by the laboratory.
6. Part I.C.5.a requires that Kinder Morgan handle, dispose of, and store all products, materials, industrial wastes, and/or other wastes in such a manner so as not to permit a discharge to State waters, except as expressly authorized.
7. Part I.C.8 requires that Kinder Morgan submit a TMDL action plan within 90 days from the end of the second year's monitoring period.
8. Part I.D.1.i and Part II.K.2 of the Permit requires that corrective action reports be signed by a duly authorized person.
9. Part I.D.3.b of the Permit requires that the contents of the SWPPP include, at a minimum, a site map identifying the location of all stormwater conveyances.
10. Part II.A.2 of the Permit requires that monitoring be conducted according to procedures approved under Title 40 Code of Federal Regulations Part 136 or alternative methods approved by the U.S. Environmental Protection Agency, unless otherwise specified.

11. Part II.A.4 of the Permit requires that all analysis for compliance with effluent limitations be in accordance with 1VAC30-45, Certification for Noncommercial Environmental Laboratories, or 1VAC30-46, Accreditation for Commercial Environmental Laboratories.
12. Part II.C of the Permit requires that Kinder Morgan submit monitoring results as required by the Permit no later than the 10th day of the following month after monitoring takes place.
13. Part II.I.3 of the Permit requires that Kinder Morgan report all instances of noncompliance at the time the next monitoring reports are submitted.
14. On May 18, 2017, DEQ inspected the Facility and observed that:
 - a. As a result of the exposed working face of the salt piles, materials were being captured by stormwater throughout the Facility in and running off to the stormwater conveyances.
 - b. The site map in the SWPPP did not include the storm water conveyances, including the drainage of drop inlets.
 - c. Corrective actions documented during the routine Facility inspections had not been signed in accordance with Part II.K by a duly authorized person.
 - d. There were several reporting errors on DMRs.
 - i. Analysis for the Total Nitrogen and Nitrate-Nitrite parameters were incorrectly reported for the first 2016 semi-annual reporting period. Nitrate analysis was not completed for this period. Total nitrogen and Nitrate-Nitrite cannot be correctly reported without the Nitrate portion.
 - ii. Kinder Morgan failed to indicate on the DMR a pH violation for the first semiannual DMR of 2015.
 - iii. The method of analysis for salinity was reported as "meter" by the laboratory rather than the analytical method for the first and second 2015 and first 2016 semi-annual reporting periods. It is unknown if an accredited method was used for the analysis.
15. On July 10, 2017, Kinder Morgan responded to the inspection report by maintaining that it had addressed housekeeping issues, trained its employees on best management practices to prevent future issues from occurring, corrected the SWPPP deficiencies by updating its site map and signing its corrective actions, corrected and submitted updated DMRs, and reviewed the salinity method with the laboratory. Kinder Morgan also

submitted an updated "Salt Storage Management Practices" document, which DEQ received on August 28, 2017.

16. Part I.A of the Permit requires that Kinder Morgan limit and monitor stormwater runoff and process wastewater discharges in accordance with the limits set forth in Part I.A.
17. Part I.A of the Permit requires that Kinder Morgan report the parameter concentration for copper and lead in UG/L.
18. Part I.B.1 of the Permit requires that Kinder Morgan meet the Whole Effluent Toxicity limitation of 1.00 Tux (LC50 = 100% effluent).
19. In submitting its DMRs, Kinder Morgan indicated that it exceeded discharge limitations for toxicity for the January through December 2015 and January through December 2016 reporting periods, and total recoverable copper for the January through June 2015 reporting period. In addition, DEQ noted that the annual and semi-annual 2016 DMRs due on or before January 10, 2017 were not received until January 17, 2017, parameters were incorrectly reported in mg/L instead of UG/L for the July through December 2016 reporting period, and no samples were taken for all parameters for the January through June 2017 reporting period.
20. TRO issued WL No. W2016-02-T-1057 on February 10, 2016 and NOV No. W2017-07-T-0004 on July 21, 2017 for the exceedances.
21. Kinder Morgan responded to the NOV by letter dated August 4, 2017. In its response, Kinder Morgan maintained that it was unable to sample during the first 2017 semiannual monitoring period due to extended dry periods or no discharge after a qualifying rainfall event. Kinder Morgan believed that the toxicity exceedances were due to a concentration of substances in the stormwater retention pond as a result of low rainfall and a lack of tidal influence to dilute the discharge. Kinder Morgan corrected and resubmitted its DMRs to list the appropriate units.
22. Kinder Morgan's DMRs indicate that it discharged stormwater runoff and process wastewaters associated with industrial activities from the Facility during the 2015 and 2016 reporting periods referenced above.
23. Va. Code § 62.1-44.5 and 9VAC25-31-50 state that except in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.
24. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a "certificate" under the statute.
25. The Department has issued no permits or certificates to Kinder Morgan other than VPDES Permit No. VA0081418.

26. The Southern Branch of the Elizabeth River is a surface water located wholly within the Commonwealth and is a "state water" under State Water Control Law.
27. Based on the results of the May inspection, the January 2015 through June 2017 DMRs, and subsequent documentation submitted on July 10 and August 4, 2017, the Board concludes that Kinder Morgan has violated Parts I.A, I.B.1, I.C.3, I.C.4, I.C.5.a, I.C.8, I.D.1.i, II.K.2, I.D.3.b, II.A.2, II.A.4, II.C, and II.I.3 of the Permit, Va. Code § 62.1-44.5, and 9VAC25-31-50, by discharging stormwater runoff and process wastewaters associated with industrial activities from the Facility while concurrently failing to comply with the conditions of the Permit, as described in paragraphs C(14) and C(19), above.
28. On October 26, 2017, DEQ met with representatives of Kinder Morgan at its Facility to discuss the Order. At the meeting, Kinder Morgan maintained that it had minimized exposure of salt areas to the maximum extent practicable and therefore is in compliance with the handling and storage requirements in Part I.C.5 of the Permit. On October 31, 2017, Kinder Morgan provided an analysis of best management practices and practical alternatives to tarp cover management of the salt piles.
29. Kinder Morgan has submitted documentation that verifies that the reporting violations as described in paragraphs C(14d) and C(19), above, have been corrected.
30. In order for Kinder Morgan to return to compliance, DEQ staff and representatives of Kinder Morgan have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Kinder Morgan, and Kinder Morgan agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$14,200.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Kinder Morgan shall include its Federal Employer Identification Number (FEIN) 76-0380342 with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Kinder Morgan shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Kinder Morgan for good cause shown by Kinder Morgan, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order, the May 18, 2017 inspection report, and in NOV No. W2017-07-T-0004 dated July 21, 2017. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Kinder Morgan admits to the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law contained herein.
4. Kinder Morgan consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Kinder Morgan declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Kinder Morgan to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Kinder Morgan shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Kinder Morgan shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Kinder Morgan shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Kinder Morgan. Nevertheless, Kinder Morgan agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
 - a. The Director or his designee terminates the Order after Kinder Morgan has completed all of the requirements of the Order;
 - b. Kinder Morgan petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Kinder Morgan.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Kinder Morgan from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Kinder Morgan and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of Kinder Morgan certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Kinder Morgan to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Kinder Morgan.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Kinder Morgan voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 21 day of FEBRUARY, 2018.



Craig R. Nicol, Regional Director
Department of Environmental Quality

Kinder Morgan Operating L.P. "C" voluntarily agrees to the issuance of this Order.

Date: 1/2/2018 By: Arthur J. Rudolph, VP of Operations
(Person) (Title)
Kinder Morgan Operating L.P. "C"

South Carolina
Commonwealth of Virginia
City/County of Charleston

The foregoing document was signed and acknowledged before me this 2nd day of January, 2018, by Arthur Rudolph who is VP Terminal SE Region of Kinder Morgan Operating L.P. "C", on behalf of the limited partnership.

Arthur Rudolph
Notary Public

Registration No. _____

My commission expires: August 3rd, 2025

Notary seal:

APPENDIX A SCHEDULE OF COMPLIANCE

1. Corrective Action Plan and Schedule

- a. Within 30 days of the effective date of this Order, Kinder Morgan shall submit to DEQ for review and approval a Corrective Action Plan ("CAP") and schedule ("Schedule") that identifies and addresses the cause(s) of the toxicity Permit limit exceedances;
- b. Upon its approval, said CAP and Schedule shall become a part of and enforceable under the terms of this Order.
- c. Kinder Morgan shall submit a final report documenting completion of the CAP, in accordance with the Schedule set forth in the CAP, and containing the results of the above referenced evaluation, to DEQ within 30 days of completion of the CAP, for its review.
- d. If the approved CAP has not or cannot be completed as described in the approved CAP Schedule, Kinder Morgan shall notify DEQ in writing no later than 30 days of discovery of the inability to complete the approved CAP and such notification shall include an alternative CAP proposal for review and approval by DEQ.

2. DEQ Contact

Unless otherwise specified in this Order, Kinder Morgan shall submit all requirements of Appendix A of this Order to:

Regional Director
VA DEQ – Tidewater Regional Office
5636 Southern Boulevard
Virginia Beach, VA 23462